No. 80-1351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALBEMARLE COUNTY SCHOOL BOARD,
Petitioner,

v.

SUSAN PAXMAN,
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES L. SANDERLIN*
JOHN W. BURKE, III
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219
(804) 644-4131

Attorneys for
Albemarle County School Board

September, 1980

*Counsel of Record

QUESTIONS PRESENTED

Whether the Albemarle County School Board violated the constitutional rights of Mrs. Paxman?

Whether the United States Court of Appeals For the Fourth Circuit in *Paxman, et al.*, v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980), properly awarded respondent attorneys' fees under 42 U.S.C. § 1988?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISION 2

STATEMENT OF THE CASE 3

REASONS FOR ALLOWANCE OF THE WRIT 5

A. Mrs. Paxman Suffered No Constitutional Wrong..... 5

B. The Fourth Circuit Court Of Appeals Improperly Awarded Attorneys' Fees To Mrs. Paxman 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Cleveland Board of Education v. *LaFleur*, 414 U.S. 632 (1974) 4, 5, 6

Cohen v. *Chesterfield County Board of Education*, 473 F.2d 395 (4th Cir. 1973) (en banc) *rev'd sub nom., Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974) 4

Paxman, et al. v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980) . 1, 2

Paxman, et al. v. *Wilkerson, et al.*, 390 F. Supp. 442 (E.D. Va. 1975) 2

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1343(3) 3

28 U.S.C. § 2201 3

42 U.S.C. § 1988 ..... 1, 2

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*Susan Paxman and Leslie Gough apparently adopted the style "Henrico County School Board and Albemarle County School Board, et al." in their Petition as a shorthand by which to refer to the defendants "connected with Albemarle and Henrico Counties," which defendants were not dismissed by the Fourth Circuit Court of Appeals in *Paxman, et al.* v. *Campbell, et al.*, 612 F.2d at 854. In this Cross-Petition For Writ Of Certiorari, petitioner, so as to avoid confusion, will adopt this shorthand to refer to all defendants connected with Albemarle County. These defendants include: Clarence S. McClure, Comer Smith, Douglas White, Allen Kindrick, Carl M. Van Fossen, H. Edward Chapman, and Rodger Rinehart, Jr. For a full style of the case before the Fourth Circuit Court of Appeals see Appendix to Mrs. Paxman and Mrs. Gough's Petition For Writ of Certiorari, pp. 22a-29a.

**Since both the defendant class and the plaintiff class have been dismissed, Mrs. Paxman and Mrs. Gough no longer present claims of a representative type, and Mrs. Gough has no basis for any claim for relief or attorneys' fees against Albemarle County School Board.

OPINIONS BELOW*

Paxman, et al. v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980).

Paxman, et al. v. *Wilkerson, et al.*, 390 F. Supp. 442 (E.D. Va. 1975).

JURISDICTION

On January 2, 1980, the Fourth Circuit Court of Appeals entered its decision in *Paxman,* and as part of its holding granted Mrs. Paxman, an as yet undetermined, appellate attorneys' fee. A Petition For Rehearing en banc to address issues other than the question of attorneys' fees was denied on March 27, 1980. Petitioner files this Cross-Petition For Writ of Certiorari pursuant to Rule 19.5 of the Rules of the Supreme Court of the United States. Petitioner received the original Petition For Writ Of Certiorari to which this Cross-Petition For Writ Of Certiorari corresponds on August 22, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

42 U.S.C. § 1988:

Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object,

*To avoid duplication, the opinions below, which are set forth in full in the Appendix to Mrs. Paxman and Mrs. Gough's Petition For Writ Of Certiorari are not reproduced.

or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction, of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This litigation began December 6, 1971, when two teachers, Susan Paxman and Leslie Gough, filed a class action under 42 U.S.C. § 1983 against members of the Albemarle and Henrico County School Boards challenging their maternity leave policies. Mrs. Paxman and Mrs. Gough based jurisdiction of the United States District Court below on 28 U.S.C. §§ 1343(3) and 2201.

In 1972, Albemarle County voluntarily abandoned the challenged maternity leave policy, which had been approved by the Albemarle Education Association,[1] and did not seek

[1] The Albemarle Education Association, the local arm of the National Education Association, approved the maternity leave policy of Albemarle County challenged in this suit. Deposition of Susan Paxman, pp. 31-32, Mar. 7, 1972 (Appendix to proceeding before Fourth Circuit Court of Appeals (App.), pp. 325-26); Deposition of Warren Comer Smith, pp. 4-5, Mar. 7, 1972 (App. 388-89).

to reinstate it despite the Fourth Circuit Court of Appeals' decision in *Cohen* v. *Chesterfield County Board of Education*, 473 F.2d 395 (4th Cir. 1973) (en banc) *rev'd sub nom., Cleveland Board of Education* v. *LeFleur*, 414 U.S. 632 (1974), upholding similar maternity leave policies. Since 1972, the thrust of this litigation has become increasingly artificial and inapplicable to Mrs. Paxman.

On January 2, 1980, in an en banc decision on rehearing the Fourth Circuit Court of Appeals, substantially reversed the district court's decision in *Paxman*. The appellate court reversed the judgment of the district court that would have certified both a plaintiff class and a defendant class.[2] The court then dismissed all defendants except those connected with Albemarle and Henrico County.[3] The appellate court next reversed the district court's award of monetary relief.[4] Four of seven judges then voted to grant reinstatement[5] even though Mrs. Paxman never sought reinstatement following the end of pregnancy. Moreover, there is no indication that she now seeks reinstatement. The Fourth Circuit Court of Appeals then awarded to Mrs. Paxman and Mrs. Gough appellate attorneys' fees of an as yet undetermined amount.[6]

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[2] 612 F.2d at 850-51, 854.

[3] *Id.* at 854.

[4] *Id.* at 850-51 (per curiam, summary), 855-60 (Widner, denial of monetary relief based upon "good faith" immunity), 864 (Haynsworth, denial of monetary relief to Paxman based upon lack of constitutional violation), 875 (Russell, denial of monetary relief to Paxman based upon lack of constitutional violation), 875 (Phillips, denial of monetary relief to Paxman based upon lack of constitutional violation).

[5] *Id. at* 851, 860-61 (Widner, Winter, Butzner and Hall).

[6] *Id.* at 851 (per curiam, summary).

REASONS FOR ALLOWANCE OF THE WRIT

A. Mrs. Paxman Suffered No Constitutional Wrong.

The actions of the Albemarle County School Board involved no deprivation of the constitutional rights of Mrs. Paxman. In the spring of 1971, Mrs. Paxman signed an employment contract, and became aware of her pregnancy several days later. Mrs. Paxman then notified the school board of her pregnancy. Several weeks before the beginning of the fall school term, the school board informed her that her employment was terminated and that the school board would replace her with a teacher who could be expected to teach throughout the school year. Albemarle County's maternity policy expressly permitted the school board to immediately terminate Mrs. Paxman under these facts.[7] In *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), this Court recognized the importance of continuity of instruction.[8] While under *LaFleur* a teacher who discovers her pregnancy during the school year has the right to determine when she will terminate and thus create a discontinuity, nothing in *LaFleur* suggests that Albemarle could not consider continuity of instruction and hire someone else when the pregnancy was known well before the start of the school year. By doing this, it would avoid the known disruption, which would occur when she had to stop work because of the birth of the child. Circuit Judges Haynesworth, Russell and Phillips agreed with this analysis and concluded that "Mrs. Paxman suffered no constitutional wrong."[9] Contrary to the patchwork decision of the Fourth Circuit Court of Appeals, the Albemarle County School Board did not violate the constitutional rights of Mrs. Paxman.

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[7] *Id.* at 864.
[8] 414 U.S. at 641-42.
[9] *Id.* at 864, 874-75.

B. The Fourth Circuit Court of Appeals Improperly Awarded Attorneys' Fees To Mrs. Paxman.

The only relief obtained by Mrs. Paxman on appeal to the Fourth Circuit Court of Appeals was the grant of reinstatement. With respect to this relief Chief Judge Haynesworth states:

> There is in this case no showing of any failure to comply with any reemployment commitment. Neither teacher sought postbirth reemployment, and neither was wrongly denied it. Under these circumstances "reinstatement" to a position never sought seems entirely inappropriate.[10]

The maternity leave policy of Albemarle County expressly provided for reinstatement following the end of pregnancy. In fact, Albemarle County had a more liberal provision for reinstatement than that mandated by *LaFleur*.[11] The relief granted to Mrs. Paxman by the Fourth Circuit Court of Appeals is artificial because she does not now and has never sought reinstatement, which was available to her under Albemarle County's maternity leave policy.

Three judges for the Fourth Circuit Court of Appeals would grant an appellate attorneys' fee of $500[12] and four judges would remand the case for ascertainment of an appellate attorneys' fee in excess of $500.[13] For the Fourth Circuit Court of Appeals to base an award of appellate attorneys' fees on a grant of reinstatement for a teacher who does not now and who has never sought reinstatement is merely a fiction. Mrs. Paxman is not entitled to attorneys' fees for obtaining relief that she could have received upon request following the end of pregnancy.

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[10] *Id.* at 863.
[11] *See* Id. at 862.
[12] *Id.* at 851.
[13] *Id.*

An additional reason why Mrs. Paxman is not entitled to attorneys' fees is that the National Education Association (NEA) through the DuShane Fund is financing this litigation.[14] Further, Mrs. Paxman has no obligation under their agreement to repay any of the litigation costs incurred by the NEA in this suit. Her only obligation would be to repay to the extent of her monetary recovery.[15]

In sum, petitioner asks this Court to find in accordance with three judges of the Fourth Circuit Court of Appeals that Mrs. Paxman suffered no constitutional wrong.

Further, petitioner asks this Court to reverse that part of the decision of the Fourth Circuit Court of Appeals that held that Mrs. Paxman is entitled to attorneys' fees.

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant its Cross-Petition For Writ Of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JAMES L. SANDERLIN
JOHN W. BURKE, III
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219
(804) 644-4131

Attorneys for
Albemarle County School Board

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[14] Deposition of Susan Paxman, pp. 45 to 46, Mar. 7, 1972.
[15] *Id.*

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No. 80-451 and 80-452

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SUSAN PAXMAN,

Respondent.

and

HENRICO COUNTY SCHOOL BOARD,

Petitioner,

v.

LESLIE GOUGH,

Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITIONS FOR WRIT OF CERTIORARI

PHILIP J. HIRSCHKOP
BERNARD J. DiMURO
HIRSCHKOP & GRAD, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-6595
Attorneys for Respondents.

Washington, D.C. • THIEL PRESS • (202) 638-4621

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit in *Paxman, et al. v. Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980), erred in awarding attorneys' fees to respondents under 42 U.S.C. § 1988?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. . . . . (i)

TABLE OF CONTENTS. . . . . (ii)

TABLE OF AUTHORITIES . . . . . (ii)

STATMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

CONCLUSION 7

TABLE OF AUTHORITIES

Cases: Page

Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978). 6

Burt v. Abel, 585 F.2d 613 (4th Cir. 1978). 6

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). 2, 5

Cohen v. Chesterfield County School Board, 474 F.2d 394 (4th Cir. 1973). 2

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) 6

Monell v. Department of Social Services, 436 U.S. 658 (1978). 7

Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980) . . . . . (i)

Wheeler v. Durham City Board of Education, 585 F.2d 618 (4th Cir. 1978) 6

Statutes:

42 U.S.C. § 1983. 1

Other Authorities:

Federal Rule of Civil Procedure 23(b) (1) and (2) 2, 3, 6

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BRIEF IN OPPOSITION TO CROSS-PETITIONS FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On December 6, 1971, the respondents, Susan Paxman and Leslie Gough, brought a bilateral class action under 42 U.S.C. § 1983 on behalf of all public school teachers in Virginia. They sought declaratory relief, as well as

backpay, claiming that their teaching contracts were terminated in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. Specifically, respondents asserted that the mandatory maternity policies enforced by Virginia school boards were unconstitutional.

On November 22, 1972, the district court entered summary judgment in favor of the plaintiff class on the constitutional violations and determined that the suit should be maintained as a class action under F.R.C.P. 23(b)(1).[1] The district court overruled itself on the constitutional violations upon the Fourth Circuit's decision in *Cohen v. Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973). Finally, in March, 1975, the district court entered summary judgment for the respondents' class upon this Court's decision in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), reversing the Fourth Circuit's decision in *Cohen*.[2] By that order, the district court also, *sua sponte*, amended the defendant class to consist of members of school boards, rather than the school boards themselves, and re-designated this action as a class action under F.R.C.P. 23(b)(2). Finally, the district court ordered that respondents' class be granted reinstatement with backpay.

The district court's order was appealed by both sides, after which briefs were filed and oral argument was held before a panel of the United States Court of Appeals for the Fourth Circuit.

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[1] App. 36(a). References to the appendix are to be found in respondent's Petition for Writ of Certiorari, No. 80-270.

[2] App. 2(a).

On January 2, 1980, the Fourth Circuit upheld the district court's decision in two major respects.[3] First, the court upheld the judgment of declaratory relief against the unconstitutional policies of the school boards. Secondly, the court ordered reinstatement to the named plaintiffs, respondents herein. The Fourth Circuit reversed the district court's order certifying respondents' class under F.R.C.P. 23(b)(2), dismissing all but the named plaintiffs and the respective school boards with whom they had contracts, without prejudice to the rights of the dismissed members of respondents' class.[4]

SUMMARY OF ARGUMENT

Petitioners claim that the Fourth Circuit's award of attorneys' fees to the respondents was improper, claiming that respondents did not prevail on any significant issue on appeal. Petitioners ignore the appellate court's order granting respondents reinstatement and declaratory relief. That respondents did not prevail on all issues is of no consequence except in determining the amount of fees to be ultimately awarded. In arguing that the Fourth Circuit's opinion did not benefit the respondents, petitioners inappropriately seek to have this Court re-decide the substantive issues settled by that court. Respondents did prevail on appeal in two respects, and therefore, an award of attorneys' fees was appropriate.

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[3] App. 28(a).

[4] These persons are either free to file motions for intervention with the district court or to file their own suits, as set forth in foot note 11 of the appellate court's decision, if necessary to secure their rights. App. 41(a).

ARGUMENT

A. Respondents Prevailed In Two Respects: Reinstatement And Declaratory Relief From The Petitioners' Constitutional Violations.

Petitioners claim that the respondents did not prevail on appeal. Their position is simply a misstatement of the Fourth Circuit's ruling in this matter. All seven judges of the Fourth Circuit recognized that respondents are entitled to an award of attorneys' fees on appeal for prevailing on either the issue of reinstatement or the constitutional violation.[5] Judges Haynesworth, Russell and Philips, who would have denied reinstatement, felt that an award of attorneys' fees was appropriate in light of the declaratory relief granted to the respondents. App. 63(a). Judges Widener, Winter, Butzner and Hall recognized that the order of reinstatement was sufficient to justify an award of fees. As Judge Widener's majority opinion recognized:

> "While the defendants have substantially prevailed in these appeals, we think the plaintiffs are entitled to an attorney's fee, from the Henrico and Albemarle defendants, in the amount of $500, for defending their reinstatement on appeal, for on that one aspect they prevailed." (App. at 55(a))

Petitioner Albemarle County attempts to avoid liability for attorneys' fees on a second ground, claiming that Mr. Paxman did not suffer any constitutional violation.[6] This point was specifically appealed by Albemarle County

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[5] See, *per curiam* order, App. 31(a).

[6] Cross-petitioner, Henrico County, does not set forth this defense with respect to Mrs Gough.

to the Fourth Circuit and was summarily rejected in Part III of the majority opinion:

> "Appellants' contention that the maternity leave policies under which Mrs. Paxman and Mrs. Gough lost their jobs were not constitutionally defective under *Cleveland Board of Education, supra*, does not need extended discussion. The district court found that the two policies contained the same 'irrebuttable presumption of unfitness' found unconstitutional by the Supreme Court. We agree, and, for reasons stated by the district court, affirm its judgment on that point." (App. 42(a)).

Albemarle County's assertion that the lower court did not find a constitutional violation as to Mrs. Paxman is hence, without factual basis. This Court need not, and should not, re-decide the issue.

B. The Fourth Circuit's Decision Will Benefit All Members of Respondents' Class

Although the declaratory relief ordered by the Fourth Circuit does not directly apply to respondents' class, it is clear that the court's opinion will inure to the benefit of the dismissed class members nevertheless. Indeed, it is clear that that was intended by the court when it noted that a remand for a class action determination was not necessary to a "fair dispostion of potential claims arising out of the Henrico and Albemarle County maternity leave policies". The Fourth Circuit directed the district court to entertain sympathetically motions for intervention under F.R.C.P. 24 for those members of the respondent class who taught in those counties.[7] Hence,

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[7]The court further noted that the statute of limitations was probably tolled for all members of the class as originally certified.

it is clear that the Fourth Circuit intended the declaratory relief and the order of reinstatement granted to the named respondnets to inure to the benefit of all the original members of the class dispite the fact that the Fourth Circuit overruled the district court's class certification determination.[8]

C. An Award of Attorneys' Fees Is Appropriate Even Where A Party Does Not Prevail On All Issues.

It is of no consequence that respondents did not prevail on all the issues presented below. The extent to which they obtained all of the relief they sought is only one of many factors to be considered in setting an attorneys' fee. *See Wheeler v. Durham City Board of Education*, 585 F.2d 618, 624 (4th Cir 1978); *Burt v. Abel*, 585 F.2d 613, 617-18 (4th Cir 1978); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir), *cert denied*, 439 U.S. 934 (1978); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir 1974).

It should be noted that this case has been marred by a lengthy procedural history during appeal. (See discussion of opinion of Judge Winter below. App. 86(a).) A decision in this matter was delayed twice requiring additional

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[8]It should be noted that the district court, *sua sponte*, re-designated the class as one under 23(b)(2) which, by its literal terms, does not permit relief against a defendant class. The district court had initially certified the class as one under 23(b)(1) which has no such apparent limitations. Had the district court not altered the class certification respondents would have then, of course, had the burden of establishing appropriate certification of the class under F.R.C.P 23(b)(1). It should not be held against them that the district court made the initial error, preventing them from attempting to do so.

efforts by: respondents were ordered by the Fourth Circuit, on its own motion, to re-argue the cases *en banc* prior to its decision. In 1979, the case was again stayed by the Fourth Circuit pending this Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Subsequently, additional motions and supplemental briefs were filed by counsel. The time and effort expended by counsel to prevail on two issues out of several is to be accorded weight in making a determination as to attorneys' fees.

CONCLUSION

For the foregoing reasons, respondents urge this Court to deny petitioner's Cross-Petition For Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

PHILIP J. HIRSCHKOP
BERNARD J. DIMURO
HIRSCHKOP & GRAD, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-6595
Attorneys for Respondents.

see 80
270

see 80

452